

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

GERARD J. WALDRON
TEL 202.662.5360
FAX 202.778.5360
GWALDRON@COV.COM

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Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written *Ex Parte* Submission
CC Docket No. 96-146
CC Docket No. 04-244
CC Docket No. 98-170
RM-8783
ENF-95-20

Dear Ms. Dortch:

InfoNXX, Inc. ("InfoNXX"), by its counsel, submits this letter to urge the Commission to follow the clear intent of Congress and maintain a workable but bounded definition of "directory services" as that term is used in Section 228 of the Communication Act of 1934.

InfoNXX is a leading provider of wholesale directory assistance ("DA") services in the U.S. to wireless carriers. Whether acting in the U.S. as a wholesale provider or overseas as a retail provider, the business is the same: customers reach out to InfoNXX and similar providers because they need DA information, and after providing the caller with that information, InfoNXX is able to assist the caller with innovative services, including call connection (a service that InfoNXX pioneered), driving directions, movie showtime listings, and other related information requested by the caller. InfoNXX now provides these services on a wholesale basis in the U.S., but seeks to enter the retail market in the U.S. as it has done so successfully in the U.K.¹

The Notice of Proposed Rulemaking ("NPRM") released by the Commission on July 16, 2004 requests comment on how to define the term "directory services" that are exempt from the

¹ See Comments, Reply Comments and numerous *ex parte* submissions filed by or on behalf of InfoNXX in CC Docket No. 99-273.

pay-per-call requirements set forth in Section 228 of the Communications Act.² The term “directory services,” if it must be defined, clearly includes directory assistance and enhanced directory assistance, since those services already are included in the broad term “directory services.” If the Commission finds further clarification warranted, InfoNXX provides in these comments suggested language that satisfies the legislative intent driving the Act’s exemption for directory services, while still leaving undisturbed the remainder of Section 228’s consumer protection requirements.

1. Section 228’s Exemption For Directory Services Includes EDA

According to Section 228 of the Act, “pay-per-call services” do not include “directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate”³ The Commission has asked whether “directory services” includes enhanced DA, and an analysis of the statutory language shows that it does. As other commenters have stated, the use by Congress of different terms throughout the Act is revealing.⁴ In some contexts, Congress used narrower terminology in referring to this field. For example, in Section 251(b)(3), Congress used the narrower phrases “directory assistance” and “directory listing.”⁵ These terms generally refer to basic number and address information. But Congress chose a different term in Section 228, because it was writing in a different context, one focusing more on consumer experience than the dynamics between carriers.⁶ Consequently, Congress focused more on how consumers access information and what their expectations are in accessing certain types of

² See Section 228(i)(2) (directory services exemption).

³ *Id.* Though InfoNXX may not be a carrier the Commission has determined previously that DA providers that have call connection capacity are providers of telephone exchange service within the meaning of Section 251(b)(3). *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, Report and Order, CC-Docket No. 99-273, FCC 01-27 released January 23, 2001 at paras. 15 *et seq.* The Commission should apply this determination for the purposes of Section 228, and we urge the Commission to expressly state that the directory services exception of Section 228 applies to DA providers designated under Section 251.

⁴ Reply Comments of Verizon at 7-8; Metro One Comments at 4-5.

⁵ Section 251(b)(3) provides for dialing parity and nondiscriminatory access to “telephone numbers, operator services, directory assistance, and directory listing.”

⁶ The text and the legislative history of the Telephone Disclosure and Dispute Resolution Act (“TDDRA”) make clear that the TDDRA is aimed at improving the consumer experience. P.L. 102-556, §1(b)(4)-(7), 106 Stat. 4181 (1992); S. Rep. No. 102-190, at 3 (1991); H.R. Rep. No. 102-430, at 4-6 (1992).

information.⁷ The use of the broader, plural term “services” is evidence that Congress intended that the exemption set forth in Section 228(i)(2) be broader than “directory assistance.”⁸ The scope of directory services is not unlimited, but it does include directory assistance and other features and capabilities that relate to directory information, and collectively that information and those features and capabilities constitute directory services.

This conclusion does not break new ground, because the Commission already has taken an expansive view of directory assistance. Specifically, in the proceeding on directory listing information, the Commission stated, “Enhanced DA services *are DA services* that offer additional features such as multiple listing from a single call or concierge services.”⁹ In a similar vein, the Commission observed, “DA has grown from a simple method of obtaining a telephone number to a sophisticated voice-based portal that potentially can offer the consumer a wide spectrum of high quality services at competitive prices.”¹⁰ Thus, the Commission has already found that enhanced DA is part of an evolving directory assistance market, and the Commission should hold here that all of this activity falls under the broader term “directory services.”

Importantly, the Commission already has rejected a request to impose a narrow and rigid construction of the directory services exemption. In the N11 numbering proceeding, it declined to accept proposals that the 411 code be limited to “traditional” DA services. Instead, the Commission held that provision of enhanced DA was permissible provided that certain pro-competitive requirements were met.¹¹ To the extent that any ambiguity remains, the

⁷ See e.g., H.R. Rep. No. 102-430 at 4, noting that “in many cases the consumer does not realize the extent of the cost of the service until he or she receives the telephone bill.... Frequently, pay-per-call operators target audiences that are frequently unable to understand the costs involved, or are particularly vulnerable to their claims....”

⁸ See 2B *Sutherland Statutory Construction* § 51:2 (6th ed.) (noting that “[u]nless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense.... But if words used in a prior statute to express a certain meaning are omitted, it will be presumed that a change of meaning was intended. Thus it has been said [that] where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.”) (citations and internal quotation marks omitted).

⁹ *In the Matter of the Provision of Directory Listing Information Under the Communication Act of 1934, As Amended; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, (“DLI NPRM”) FCC 01-384 released January 9, 2002 at fn. 79 (emphasis added).

¹⁰ *Id.* at para. 1 (emphasis added).

¹¹ *The Use of N11 Code and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5572, 5600-01, paras. 47-48.

Commission should resolve it by making clear that "directory services" includes enhanced DA. This resolution would promote innovation and competition and would not interfere with Section 228's consumer protection requirements.

It also bears emphasis that DA calls generate very few complaints. InfoNXX, the leading wholesale provider to wireless customers, is aware of no complaints to the Commission in at least the past eight years on its services or charges. The questionable practices that were endemic in the pay-per-call industry in the early 1990s and that motivated Congress to adopt the Telephone Disclosure & Dispute Resolution Act ("TDDRA") are not relevant in the context of directory services. Thus, imposition of pay-per-call regulations would have the effect of burdening directory services providers without any offsetting benefits. A definition of directory services that includes enhanced DA permits enhanced DA providers to satisfy creatively the productivity needs of businesses and consumers.

2. Proposed Definition For Directory Services

As the comments provided by InfoNXX and others have made clear, Congress, by exempting "directory services" from Section 228's pay-per-call regulations, already has exempted enhanced DA. Nevertheless, InfoNXX takes this opportunity to suggest a definition of the term to clarify the matter:

"Directory services, at a minimum, are those services that provide or are capable of providing the user on a real-time basis with (A) facts about a listed entity's (1) contact information and (2) goods or services offered, and (B) assistance in connecting directly to that entity or in making use of that entity's goods or services."

The Commission may find this formulation useful because it posits "directory services" broad enough to encompass enhanced DA while also limiting the term to avoid potential abuses. This definition clarifies that Congress, in striking the balance between the desire to provide broad consumer protection provisions and the desire to promote innovation and competition, already made the choice to exempt enhanced DA from pay-per-call requirements.

* * *

Sincerely,



Gerard J. Waldron
Counsel to InfoNXX, Inc.